Supreme Court, U.S.
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No. 04-931

In The

Supreme Court of the United States

VERA SAMODUMOVA, et al.,

Petitioners,

v.

JOHN ASHCROFT, U.S. ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners, a mother and two sons, have an approved Violence Against Women Act battered spouse self-petition. Although otherwise eligible for adjustment of status to permanent residency, the sons have no venue in which to apply for such unless their deportation cases are reopened. The court below, relying on *Heckler v. Chaney,* held that because no meaningful standard of review exists against which to judge an Immigration Judge's decision to exercise *sua sponte* authority to reopen deportation proceedings, they lacked jurisdiction to review a decision not to reopen. The questions presented are as follows:

1) Whether a decision of the Board of Immigration Appeals denying a *sua sponte* Motion to Reopen may be reviewed for abuse of discretion.

2) Whether failure to review a decision of the Board of Immigration Appeals, misapplying the doctrine of *Heckler v. Chaney* in the immigration court context, violates the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

In addition to Vera Samodumova, her sons, Nikita A. Samodumov and Andrey A. Samodumov are included as petitioners. They are derivative beneficiaries of the mother's approved Violence Against Women Act self-petition (approval notice attached at App., *infra*, 33). The sons were in deportation proceedings while their mother was in exclusion proceedings.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit (hereinafter Fifth Circuit) denied Petitioner Vera Samodumova's Petition for Review in an unpublished decision of September 28, 2004 (App., *infra*, 1). On October 5, 2004, the Fifth Circuit denied the Petition for Review of Petitioners Nikita Andrevich Samodumov and Andrey Andrevich Samodumov (App., *infra*, 3) in an unpublished decision. The decision and order of the Board of Immigration Appeals dated September 24, 2003, affirming the Immigration Judge's denial of Motions to Remand (treated as Motions to Reopen) for all three Petitioners (App., *infra*, 5), is also an unpublished decision. The Immigration Judge's decision denying a Motion to Remand (treated as a Motion to Reopen) for Vera Samodumova on July 8, 1998 is attached at App., *infra*, 11. The Immigration Judge's decision of July 8, 1998, denying a Motion to Remand (treated as a Motion to Reopen) for Nikita and Andrey Samodumov, is attached at App., *infra*, 21.

JURISDICTION

The judgments of the Fifth Circuit were entered on September 28, 2004 and October 5, 2004, respectively. This Court has jurisdiction to review the Fifth Circuit's dismissal of Petitioners' Petitions for Review pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

U.S. Const. amend. V.

STATEMENT

The Petitioners, a mother (who had recently married a U.S. citizen) and two sons, then ages 10 and 12, nationals of Russia, attempted to enter the United States on or about September 28, 1994, through the international airport in Houston, Texas at the behest of, and to unite with, the U.S. citizen husband of the lead Petitioner. When officials found that the lead Petitioner was trying to enter the country with falsified documents prepared by her U.S. citizen husband (unbeknownst to her), she was issued a Form I-122, the charging document for excludable aliens, and placed in exclusion proceedings. Subsequently, on March 17, 1995, the former Immigration and Naturalization Service (INS)[1] charged the then-minor son Petitioners with being deportable and issued Orders to Show Cause, placing them in deportation proceedings.

[1] The INS is now under the auspices of the Department of Homeland Security, and the different services were divided among the U.S. Citizenship and Immigration Services, the U.S. Immigration and Customs Enforcement, and the U.S. Customs and Border Protection. The Immigration Courts and the Board of Immigration Appeals are both part of the Department of Justice's Executive Office for Immigration Review.

A) Immigration Proceedings

The Immigration Judge denied the asylum application of lead Petitioner (ordering her excluded) on February 20, 1996. The sons were included in this asylum application, and were granted voluntary departure of 30 days on February 20, 1996, with an alternative order of deportation if they did not depart the United States by March 20, 1996. An appeal of the asylum denial was timely filed with the Board of Immigration Appeals (hereinafter Board), but was subsequently withdrawn. These orders became final administrative decisions when the asylum appeal was withdrawn on November 26, 1996, as noted in the Immigration Judge's decisions for the lead Petitioner and for the sons (App., *infra*, 16, 26-27, 28).

The Petitioners (with the mother as lead applicant) filed a Violence Against Women Act[2] self-petition with the former INS (including the sons as derivative beneficiaries), based on the abuse from her U.S. citizen husband. The INS approved this application on August 18, 1997 (App., *infra*, 33), as lead Petitioner had met the elements of having resided with and been battered by or subjected to extreme mental cruelty by her U.S. citizen husband, and her deportation would result in extreme hardship to her or her children. *See* 8 U.S.C. § 1154(a)(1)(A)(iii) (1994). Between February 1996 and December 2001, the Petitioners filed several appeals and motions to reopen with the Immigration Judge and the Board, some of which were withdrawn by Petitioners through previous counsel. App., *infra*, 6-7, 13-14, 23-24. On February 25, 1998 Petitioners

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[2] VAWA is the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902-1955, 8 U.S.C. §§ 1151, 1154, 1186a, 1186a note, 1254, 2245 (1994).

filed Motions to Remand (treated as Motions to Reopen), requesting that the cases be reopened and terminated for Petitioners to pursue adjustment of status at the District Office of the then-INS. *Id.*, *infra,* 14, 24-25. The Immigration Judge denied these motions on July 8, 1998. *Id.*, *infra,* 20, 32.

On September 25, 2003, the Board denied all pending appeals and motions, including the Request for *Sua Sponte* Motion to Reopen and Remand, which was filed with the Immigration Judge on February 25, 1998. *Id.*, *infra*, 5. The Petitioners timely filed Petitions for Review with the Fifth Circuit on October 23, 2003, which were received on October 24, 2003.

B) Court of Appeals' Decisions

On September 28, 2004, the Fifth Circuit denied the lead Petitioner's Petition for Review (*Id.*, *infra*, 1) stating that the court lacked jurisdiction to review a decision not to reopen deportation proceedings because no meaningful standard exists against which to judge an Immigration Judge's decision to exercise *sua sponte* authority to reopen deportation proceedings, citing *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249 (5th Cir. 2004), (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)). On October 5, 2004, the Fifth Circuit denied the son Petitioners' Petition for Review stating again that the court lacked jurisdiction because no meaningful standard of review exists, also citing to *Enriquez-Alvarado* and *Heckler* (App., *infra* 3).

REASONS FOR GRANTING THE PETITION

This Court has previously found the issue of an agency's discretion as worthy of granting the writ of certiorari, specifically in *Heckler v. Chaney*. This issue is of national importance, as various Courts of Appeal have misapplied the holding in *Heckler* to immigration court cases, affecting numerous individuals with final orders of deportation or removal who are eligible for positive discretion exercised over otherwise untimely motions to reopen or remand (treated as motions to reopen). Furthermore, precisely because the Board and the Immigration Judges (the Executive Office for Immigration Review of the U.S. Department of Justice) exercise broad discretion in the judicial context of exclusion, deportation, and removal proceedings under the aegis of the Attorney General, it is imperative that there be redress for abuse of such discretion, and that the exercise of such discretion be reviewed by the Courts of Appeal. Being deported or removed from the United States without possibility of review of a denial of a *sua sponte* motion to reopen would deprive such individuals of Due Process under the Fifth Amendment, and is worthy of review by this Court.

A) Misapplication of the doctrine in *Heckler v. Chaney*

Various Circuits have misapplied the *Heckler* decision in the Immigration Court and Board of Immigration Appeals context, finding no meaningful standard of review for denials of *sua sponte* motions to reopen because of the "unfettered discretion" of the agency, thus allowing the Board's decision to stand without review, even where there may have been legal error at the Board or Immigration Court level (which could at a minimum have constituted

abuse of discretion). *See Luis v. INS*, 196 F.3d 36 (1st Cir. 1999) (stating the above in *dicta*, but finding that petitioner had not exhausted her administrative remedies by not having requested *sua sponte* relief from the Board); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472 (3d Cir. 2003); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246 (5th Cir. 2004); *Harchenko v. Ashcroft*, 379 F.3d 405 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585 (7th Cir. 2003); *Ekimian v. INS*, 303 F.3d 1153 (9th Cir. 2002), *but see* Bright's dissent; *Belay-Gebru v. INS*, 327 F.3d 998 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999) (stating the above, although the court found there was no abuse of discretion, therefore implying that discretion may be reviewed); *Cf. Mejia-Rodriguez v. Reno*, 178 F.3d 1145 n.5 (11th Cir. 1999) (finding that the Board did not abuse its discretion under its *sua sponte* authority). While *Heckler* is applicable in the context of the enforcement powers of an agency, it is not applicable to the authority of the Judges of the Immigration Court and the Board (acting under the authority of the Attorney General), to reopen deportation or removal proceedings. *See Ekimian*, *supra*, Bright's dissent; *Socop-Gonzalez v. INS*, 208 F.3d 838 (9th Cir. 2000), vacated by 229 F.3d 860 (ordering rehearing en banc). There are no published decisions in the Second, Fourth and Eighth Circuits that specifically address the standard of review for *sua sponte* motions to reopen. However, there are unpublished decisions in the Second and Fourth Circuits that do review *sua sponte* motions to reopen for abuse of discretion, and where it appears that the accepted matter of course is the abuse of discretion standard of review. The Eighth Circuit does not appear to have reviewed the issue of *sua sponte* motions to reopen.

The issue in *Heckler* was whether there was judicial review, pursuant to 5 U.S.C. § 701(a)(2) of the Administrative Procedure Act (APA), of a Federal Drug Administration's (FDA) decision not to enforce a federal law prohibiting the use of certain drugs used for executions by lethal injection. This section of 5 U.S.C., under the judicial review chapter, states in pertinent part that judicial review "applies . . . except to the extent that . . . agency action is committed to agency discretion by law." This Court held that the FDA's decision not to take enforcement action is presumed immune from judicial review under § 701(a)(2) because enforcement has traditionally been committed to agency discretion, and therefore there should be no judicial review of an enforcement decision, as such decisions are based on the balancing of a number of factors peculiarly within the agency's expertise, such as where resources are best spent. *Heckler*, 470 U.S. at 831. This Court noted that "when an agency refuses to act, it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts are often called upon to protect." *Id.* at 832. This Court also stated that an agency action "provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner," but an agency's decision not to act does not. *Id.* This Court then found that agency decisions not to enforce were analogous to prosecutorial discretion. *Id.*; *see also Socop-Gonzalez*, *supra.*, and *Heckler* at 831-832.

As the Ninth Circuit found in *Socop-Gonzalez* (before vacating its decision after rehearing *en banc*, and reaching the same decision through equitable tolling while not addressing the *sua sponte* standard of review in the new decision), "the policy considerations animating the *Heckler*

decision do not apply to the BIA's [Board of Immigration Appeals'] power to reopen deportation proceedings." *Socop-Gonzalez, supra*. The most analogous prosecutorial discretion action of the agency, the former INS, would be to place an individual in exclusion, deportation, and now, removal proceedings. That is where the agency (i.e., the INS) would decide whether its resources are best spent in enforcing a violation of the immigration laws. Moreover, in the immigration court context, a decision not to reopen deportation proceedings effectively allows the INS to deport the individual, thus "exercising its coercive power over an individual's liberty." *Id.* (citing *Heckler*). Similarly, in the immigration context, the Board's decision not to reopen a case does give the court a "focus for judicial review," unlike inaction by the FDA in enforcing its laws. *See id.*

The enforcement actions discussed in *Heckler* are distinct from the rulings of the Immigration Court or the Board in a quasi-judicial context, in which the alien is already in deportation or removal proceedings. *See Ekimian, supra* (Bright, dissenting). The issues involved and the ultimate holdings in *Heckler* and its progeny are inapplicable to the question at hand of whether there is judicial review of the Board's denial of a request for *sua sponte* reopening. In his dissenting opinion in *Ekimian,* Justice Bright of the Ninth Circuit found that the federal courts' reliance on *Heckler* is misplaced. *Ekimian,* 303 F.3d at 1162. Specifically, he found that the decision not to reopen deportation proceedings *sua sponte* significantly differs from *Heckler*'s agency decision not to enforce a federal regulation prohibiting the use of a particular drug, as there is a focus for judicial review, and because there the Board exercises a coercive power over an individual's liberty rights. *See id.* at 1162.

In *Lincoln v. Vigil*, this Court held that there should be no judicial review of agency decisions in specific and limited circumstances, not analogous to deportation or removal proceedings. *Lincoln v. Vigil*, 508 U.S. 182 (1993). In *Lincoln*, this Court held that the decision the Indian Health Service (IHS) made regarding whether or not to allocate funds was committed to agency discretion and was not subject to review. *Id.* Specifically, this Court found that IHS was the only appropriate entity to decide to discontinue the Indian Children's Program because it pertained to allocation of funds from a lump-sum appropriation. *Id.* at 193. This Court stated that "like the decision against instituting enforcement proceedings, then, an agency's allocation of funds from a lump-sum appropriation requires a 'complicated balancing of a number of factors which are peculiarly within its expertise,'" *See Id.* at 193 (quoting *Heckler*, 470 U.S. at 831). Again, in the immigration context, the decision of whether or not to enforce a particular immigration statute and place an individual in deportation (now removal) proceedings is most analogous to the agency action contemplated in *Heckler* and *Lincoln*. However, neither case's holding is applicable in the immigration court context where the finality of an individual's deportation or removal order is at stake, as well as a liberty interest in not being deported from the United States.

B) The Board has established a meaningful standard by which a court may review its exercise of discretion, that is, exceptional situations where it would serve the interests of justice

8 C.F.R. § 1003.2(a) allows the Board to reopen *sua sponte* and provides for consideration of exceptional

circumstances. *See* Motions & Appeals of Immigration Proceedings, 61 Fed. Reg. 18,900, 18,902 (1996), " . . . section 3.2(a) [now § 1003.2(a)] of the rule provides a mechanism that allows the Board to reopen or reconsider *sua sponte* and provides a procedural vehicle for the consideration of cases with exceptional circumstances." The Board itself has outlined when it will reopen *sua sponte*, specifically where there is an exceptional situation, *see Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (Board's power to reopen *sua sponte* is limited to exceptional situations); *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998), *superseded on other grounds* (Board retains discretionary powers under regulations to reopen a case *sua sponte* in unique situations in the interest of justice), *Matter of Beckford*, 22 I&N Dec. 1216 (BIA 2000) (untimely motion to reopen shifts burden to alien to demonstrate an exceptional situation warrants *sua sponte* reopening).

Although there is no statutory definition of exceptional situations in the interest of justice for *sua sponte* motions to reopen, one may look analogously to factors that the Immigration Courts, the Board and the former INS have used in exercising their discretion in finding extreme hardship and, in the INS context, for exercising prosecutorial discretion. The factors often cited as relevant to the issue of extreme hardship include the age of the subject, the length of residence in the United States, the alien's possibility of other means of adjustment of status, the alien's position in the community, family ties in the United States and abroad, the alien's immigration history, and economic and political conditions in the alien's native country. *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

C) The standard by which to review the Board's authority in motions to reopen has been established as abuse of discretion

Federal courts have a meaningful standard of review for motions to reopen. Specifically, this Court and lower courts have recognized that the proper standard of review generally used for motions to reopen in the immigration law context is abuse of discretion. *See INS v. Doherty*, 502 U.S. 314 (1992); *Rodriguez v. Ashcroft*, 253 F.3d 797 (5th Cir. 2001) (reviewing Board denials of motions to reopen under the deferential abuse of discretion standard); *Lara v. Trominski*, 216 F.3d 487, 496 (5th Cir. 2000) (applying a highly deferential abuse of discretion standard in reviewing the Board's denial of a motion to reopen). *See also I.N.S. v. Abudu*, 485 U.S. 94, (1988); *Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998).

The abuse of discretion standard of review generally is applied to discretionary denials of relief, such as motions to reopen and motions to reconsider. 8 C.F.R. § 1003.2(a). *See also Ghassan v. INS*, 972 F.2d 631, 637 (5th Cir. 1992). Under this standard, the Board's decision may be reversed as an abuse of discretion and arbitrary if the Board fails to address meaningfully all material factors extant. *Ghassan*, 972 F.2d at 635 (citing *Diaz-Resendez v. INS*, 960 F.2d 493 (5th Cir. 1992)). Findings of fact supporting the Board's exercise of discretion, however, are reviewed to determine whether they are supported by substantial evidence. *Id.*

Some courts require, in the context of the Board reopening proceedings *sua sponte*, that all administrative remedies be exhausted by first requesting such *sua sponte* relief of the Board before the decision can be reviewed. *See Luis, supra*. This presupposes that there is a standard of review.

Furthermore, there is "'a strong presumption that Congress intends judicial review of administrative action.'" *Socop-Gonzalez*, *supra*, citing *Helgeson v. Bureau of Indian Affairs*, 153 F.3d 1000, 1003 (9th Cir. 1998) (quoting *Traynor v. Turnage*, 485 U.S. 535, 542 (1988)).

8 C.F.R. § 1003.2(a) provides that " . . . the Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." The Board's decision not to exercise its *sua sponte* authority to reopen deportation proceedings significantly differs from the FDA's decision not to enforce regulations. As Justice Scalia noted in his dissent in *INS v. Doherty*, regarding motions to reopen in general (discussed further below), motions to reopen in the immigration court context are more akin to what in the judicial context is called a "remand for further proceedings." *Doherty*, 502 U.S. at 324, *supra*. Although the Attorney General does have broad discretion, "under the INS system reopening is the sole means of raising certain issues that acquire legal relevance or practical importance only by virtue of the decision on appeal." *Id.* The Board's action is not analogous to situations of prosecutorial discretion where there has been a decision not to institute proceedings, as in *Heckler*, because in the context of the Board's actions, proceedings are already underway. *See Ekimian,* 303 F.3d at 1162-1163 (Bright, dissenting).

In his dissent in *Doherty*, Justice Scalia found that the decision not to reopen the immigration case was an abuse of discretion "according to those standards of federal administration embodied in what we have described as the 'common law' of judicial review of agency action," *Doherty*, 502 U.S. at 330 (citing *Heckler,* 470 U.S. at 832). He found the scope of the Attorney General's discretion not overly broad, as a motion to reopen in the immigration context

was more akin to a "remand for further proceedings" in the judicial context rather than of the reopening of a final judgment by a court. *Doherty, supra,* dissent. Justice Scalia concluded that "remand for that purpose [raising certain issues that acquire legal relevance or practical importance only by virtue of the decision on appeal] often requires a 'reopening' of the original hearing, and may be expressly denominated as such." *Id.* (citing *Matter of Doural*, 18 I&N Dec. 37 (BIA 1981)).

D) Failure to review a decision of the Board of Immigration Appeals denying a *sua sponte* motion to reopen violates the Due Process Clause of the Fifth Amendment

As one of the policy considerations in *Heckler*, this Court found that the FDA's failure to act had no coercive impact on an individual's liberty or property rights. Conversely, the failure to review a decision of the Board that effectively results in the Petitioners' deportation is a coercive act that deprives individuals of their liberty rights. *See Ekimian, supra,* Bright dissenting. Preventing judicial review of abuse of discretion in a Board decision in a *sua sponte* motion to reopen by the Board of Immigration Appeals would result in depriving many individuals of their liberty interest in not being deported from the United States, particularly if they are eligible for relief from deportation or removal and have been in the United States for many years.

The Fifth Circuit in *Assaad v. Ashcroft*, 378 F.3d 471 (5th Cir. 2004), found no violation of Fifth Amendment due process in the failure to receive relief that is purely discretionary. However, the *Assaad* decision mischaracterizes the nature of relief from deportation or removal by implying

that there is only a "mere hope that the benefit will be obtained," when some individuals are clearly eligible for specific forms of relief, such as adjustment of status to permanent residency. *Id.*, quoting *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11 (1979). *Greenholtz*, the underlying case cited by the Fifth Circuit in *Assaad* for such a conclusion, does not appear to have been intended by this Court for use in the immigration law context. It is inapplicable and distinguishable from an immigration court case, as it is being misapplied, just as *Heckler* has been. *Greenholtz, supra*, and *Assaad, supra*. *Assaad* is also distinguishable in that it applies the jurisdiction stripping provisions over judicial review of discretionary relief authorized by the IIRIRA, *infra*. *Assaad, supra*. These provisions do not apply to the Petitioners' cases (discussed *infra*). Finally, the *Assaad* decision ignores the liberty interest denied an individual when he is deported from the United States. *Id. supra*.

E) The Administrative Procedures Act, as established in *Abbott Labora-tories*, supports judicial review for those adversely affected by agency action

The Administrative Procedures Act embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702; *see Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). Thus, individuals, such as the Petitioners, with outstanding orders of deportation or removal that request consideration of *sua sponte* motions to reopen should be entitled to judicial review of Board decisions, as they have been adversely affected or aggrieved by agency action.

F) The Transitional rules of IIRIRA do not apply to Petitioners' case

The Petitioners are eligible for judicial review under the prior 8 U.S.C. § 1105a(a) (1994), INA § 106(a), which states in pertinent part: "the procedure prescribed by, and all provisions of chapter 158 of title 28, United States Code [judiciary and judicial proceedings, orders of federal agencies; review], shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final order of deportation. . . ." The transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which limit judicial review for specific forms of relief, do not apply to the Petitioners' case because the Petitioners have final administrative decisions from before October 30, 1996, the effective date of the transitional rules. *See* IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), § 309(c)(4), § 309(c)(4)(E)). Nevertheless, the Petitioners contend they would still be eligible for judicial review of a denial of a *sua sponte* motion to reopen even if they were subject to the transitional rules (for cases where proceedings were instituted prior to September 30, 1996 but with final orders after October 30, 1996). *Id.*

G) The Petitioners present an exceptional situation where a positive exercise of discretion would serve the interests of justice

The Petitioners merited a positive exercise of discretion for reopening their cases before the Board because their cases present exceptional situations. Regulations implementing the Violence Against Women Act provisions for abused spouses and children of U.S. citizens and permanent residents were published after the Immigration Judge's February 20, 1996 orders. *See* 61 Fed. Reg. 13061 (1996), "This interim rule amends the . . . regulations to

allow a spouse or child to seek immigrant classification if he or she has been battered by, or subjected to extreme cruelty committed by, the citizen . . . spouse. . . ." Before these regulations, the Petitioners had no mechanism for which to apply for benefits under the Violence Against Women Act (VAWA) (*supra*). Subsequent to the Immigration Judge's decision, the Petitioners applied for and were granted a VAWA self-petition in August 1997, making them eligible for adjustment of status to lawful permanent residency (App., *infra*, 33), new evidence that could not have been presented at the original hearing in February 1996. The Immigration Court and the Board refused to reopen the cases, even though the Petitioners had submitted relevant new evidence that could not have been presented at the time of the hearing, when the orders were issued on February 20, 1996. There has been error throughout this case at the Immigration Court and Board level in not recognizing the above as new and material evidence. Furthermore, the Board issued one decision for all three petitioners, not taking into account that the son Petitioners, who were in deportation proceedings, are *not* eligible to adjust status before the District Director of the former INS, whereas their mother, who was in exclusion proceedings, is eligible to adjust status before the District Director. This is a relevant and material error of law. The Petitioners' eligibility for adjustment of status has never been in question. However, the Immigration Court and the Board committed legal error in not distinguishing the sons' lack of venue in which to adjust status.

The Petitioners' cases present exceptional situations: 1) they are beneficiaries of an abused spouse self-petition (an application that in and of itself presents humanitarian and public interest concerns); 2) two of the Petitioners were minor children at the time of the original order of

deportation in 1996, and 3) although the lead Petitioner may adjust before the District Director of the U.S. Citizenship and Immigration Services (U.S. CIS) because she was in exclusion proceedings, the two then-minor Petitioners have no venue in which to adjust status unless their deportation proceedings are reopened for them to adjust before the Immigration Judge who has jurisdiction over their cases. There are numerous positive equities in the Petitioners' cases similar to the factors listed in *Matter of Anderson, supra.*

The interests of justice would be served in the Petitioner sons' cases if their deportation proceedings were reopened so they could apply for adjustment of status under their approved VAWA petition before the Immigration Judge, or have their cases reopened and terminated, so that jurisdiction could finally lie with the District Director of the U.S. CIS. *Matter of X-G-W-, supra.* Finally, because the Petitioners invoked the *sua sponte* authority of the Board and presented new evidence in connection with a previously unavailable benefit and relief, they presented an exceptional situation analogous to those in the Board's own cases relating to *sua sponte* motions.

H) There will be a widespread impact of allowing the lower court's decision to stand

Numerous individuals, including the Petitioners, with otherwise meritorious cases have been negatively affected by decisions denying judicial review of *sua sponte* motions to reopen in the following circuits: *Luis v. INS* (1st Cir.), *supra*; *Calle-Vujiles v. Ashcroft* (3d Cir.), *supra*; *Enriquez-Alvarado v. Ashcroft* (5th Cir.), *supra*; *Harchenko v. INS* (6th Cir.), *supra*; *Pilch v. Ashcroft* (7th Cir.), *supra*; *Ekimian*

v. INS (9th Cir.), *supra*; *Belay-Gebru v. INS* (10th Cir.), *supra*; *Anin v. Reno* (11th Cir.), *supra*. The individuals in these cases are merely representative of the numerous other cases that have been decided similarly, many in unpublished decisions, and does not even count those individuals who may have been prevented from petitioning for judicial review of a decision by an immigration judge or the Board in a *sua sponte* motion to reopen because of the precedent created from these decisions, as well as the cost of litigation. It is the Petitioners' contention that the above mentioned Circuit decisions are based on misapplication of the doctrine in *Heckler v. Chaney*. *See Heckler, supra*. Additionally, there has been some apparent confusion within these circuits, and inconsistent application of the law within some of the same circuits, as demonstrated in the *Anin* decision in the Eleventh Circuit being internally inconsistent (finding no abuse of discretion) and inconsistent with a prior decision, *Mejia-Rodriguez*. *Anin, supra*; *Mejia-Rodriguez, supra*. Similarly, the Ninth Circuit had first expressly held that there was a meaningful standard of review for *sua sponte* motions to reopen in the first *Socop-Gonzalez* decision, and in a rehearing *en banc* did not reach the issue of whether there was a standard of review. *Socop-Gonzalez, supra*. The Ninth Circuit then decided the *Ekimian* case, with Justice Bright dissenting. This is a serious issue where the interests of justice are not being served, and the liberty interests of individuals with potential relief from removal are being violated. *See Ekimian, supra*.

For the above-stated reasons, the Fifth Circuit's decision in the Petitioners' case calls for exercise of this Court's supervisory power in establishing whether a

decision in a *sua sponte* motion to reopen may be reviewed for abuse of discretion.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MAGALI S. CANDLER
TINDALL & FOSTER, P.C.
600 Travis, Suite 2800
Houston, Texas 77002
(713) 229-8733
Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-60860
Summary Calendar

VERA SAMODOUMOVA,

Petitioner,

versus

JOHN ASHCROFT, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A73 113 706

(Filed September 28, 2004)

Before JONES, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Vera Samodoumova, a native and citizen of Russia, petitions for review of the Board of Immigration Appeals' ("BIA") dismissal of her appeal and denial of motions to remand. Because only the District Director may adjudicate her pending application for adjustment of status, Samodoumova

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R 47.5.4.

argues that the Immigration Judge ("IJ") or the BIA should have reopened her case and remanded it to the District Director.

We recently addressed a similar argument that the BIA should have compelled the IJ to reopen a deportation case. Because "no meaningful standard exists against which to judge an IJ's decision to exercise *sua sponte* authority to reopen deportation proceedings," we lack jurisdiction to review the decision not to reopen. *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249 (5th Cir. 2004) (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

Accordingly, the petition for review is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-60862
Summary Calendar

NIKITA ANDREVICH SAMODUMOV;
ANDREY ANDREVICH SAMODUMOV,

Petitioners,

v.

JOHN ASHCROFT, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A73-113-707
BIA No. A73-113-708

(Filed October 5, 2004)

Before JOLLY, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:*

In this appeal, we review the Board of Immigration Appeals' (hereinafter, "BIA") decision to dismiss Petitioners, Nikita and Andrey Samodumov's, appeals and the BIA's denial of the Samodumovs' motions to remand.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R 47.5.4.

Nikita and Andrey Samodumov, natives and citizens of Russia, argue that either the Immigration Judge or the BIA should have reopened their case and remanded it to the District Director because only the District Director has jurisdiction to adjudicate their pending application for adjustment of status.

This court recently held that because no meaningful standard exists against which to judge an Immigration Judge's decision to exercise sua sponte authority to reopen deportation proceedings, we lack jurisdiction to review a decision not to reopen deportation proceedings. *See Enrique-Alvarado* [sic] *v. Ashcroft*, 371 F.3d 246, 249 (5th Cir. 2004) (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

Therefore, the Samodumovs' petition for review is DENIED.

[SEAL] **U.S. Department of Justice**

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Williamson, Peter D., Esquire
500 Jefferson, Suite 2040,
Houston, TX 77002-0000

Office of the District Counsel/HO
126 Northpoint Drive
Houston, TX 77060

Name: SAMODOUMOVA, VERA **A73-113-706**
Riders: 73-113-707 73-113-708

Date of this notice: 09/24/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Jeffrey Fratter
Jeffrey Fratter
Chief Clerk

Enclosure

Board order also includes 73-113-707 and 73-113-708.

Panel Members:
COLE, PATRICIA A.
FILPPU, LAURI S.
HESS, FRED

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A73 113 706 – Houston Date: Sep. 24, 2003

In re: VERA SAMODOUMOVA

IN EXCLUSION PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF APPLICANT: Peter D. Williamson, Esquire

ON BEHALF OF DHS: Benjamin D. Somera
Assistant District Counsel

EXCLUDABLE: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182 (a)(6)(C)(i)] – Fraud or willful misrepresentation of a material fact (A73 113 706)

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] – Immigrant – no valid immigrant visa or entry document (A73 113 706)

APPLICATION: Remand; reopening

Applicant was delivered a Notice to Applicant for Admission Detained for Hearing Before Immigration Judge on September 28, 1994. After a merits hearing, the Immigration Judge denied the applicant's application for asylum and granted her voluntary departure on February 20, 1996. The applicant appealed the Immigration Judge's decision on February 29, 1996. On September 30, 1996, the applicant erroneously filed a motion to reopen with the Immigration Judge that was ultimately denied on June 24, 1997. On November 12, 1996, the applicant withdrew her appeal pending before

the board. On July 21, 1997, the applicant again filed an appeal with the Board seeking review of the Immigration Judge's denial of the motion to reopen. This appeal was also withdrawn. Finally, the applicant filed a motion to remand her adjustment application to the district director with the Immigration Judge on February 25, 1998.

The applicant currently appeals from the July 8, 1998, decision of the Immigration Judge denying her motion to remand. While her appeal was pending, the applicant filed a motion to remand before the board on June 18, 1999, seeking the opportunity to apply for protection under the Convention Against Torture. On December 11, 2001, the applicant filed a second motion to remand with the Board to apply for special rule cancellation under section 240A(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(2). The appeal will be dismissed. The motions to remand will be denied.

The applicant raises numerous challenges on appeal. We find, however, that the Immigration Judge did not err by denying the applicant's motion to remand. The Immigration Judge correctly found (1) that she lacked jurisdiction to adjust the applicant's status because she is in exclusion proceedings and (2) that it would be improper to remand the applicant's case to the district director. *Matter of Castro*, 21 I&N Dec. 379 (BIA 1996) (finding that jurisdiction over an alien's application for adjustment of status generally lies with the district director).[1]

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[1] We note, however, that the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) can

(Continued on following page)

To the extent that the applicant challenges the Immigration Judge's decisions regarding prior motions, we find that a direct appeal would have been the proper method for contesting those decisions. The applicant, however, has withdrawn her appeals and effectively waived her right to appeal. Consequently, we decline to address any issues arising from previous motions because they are not properly before us.

We will consider the applicant's motions to remand. 8 C.F.R. § 1003.2(c)(4) ("a motion to reopen . . . that is filed while an appeal is pending before the Board, may be deemed a motion to remand"). First, we find that the applicant's motion to remand seeking protection under the Convention Against Torture is timely. 8 C.F.R. § 1208.18(b)(2) (providing that motions seeking protection under 8 C.F.R. § 1208.16(c) filed after a final order of exclusion made prior to March 22, 1999, are not subject to time and numerical limitations under 8 C.F.R. §§ 1003.23 and 1003.2). The regulations provide that the burden of proof is on the alien when seeking to qualify for protection under the Convention Against Torture. 8 C.F.R. § 1208.16(c)(2). While the applicant seeks this new form of relief, she has broadly asserted that she will be tortured because of her knowledge of high-tech defense maters but has failed to provide any new evidence supporting her claim. Her vague allegations do not amount to *prima facie* evidence that the applicant would more likely than not be subject to torture by any

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independently adjudicate an application for adjustment of status during the pendency of exclusion proceedings. *See Matter of Castro, supra.* Therefore, the applicant may apply for VAWA relief directly with the district director.

public official or at the instigation or with the acquiescence of such an official in Russia. Nor does her testimony and evidence previously submitted in support of her asylum and withholding claims indicate that the applicant is *prima facie* eligible for relief under the Convention Against Torture. 8 C.F.R. §§ 1208.16(c), 1208.18(a).

As for the applicant's motion to remand to apply for special rule cancellation, we find that the statute solely contemplates relief for battered spouses who are in removal proceedings and does not extend relief to those in exclusion and deportation proceedings. Consequently, we conclude that the applicant has not presented any basis upon which a motion to remand can be granted. *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (finding that the Board may deny a motion to remand where a *prima facie* case for relief sought has not been established and noting that the party seeking a remand bears a "heavy burden" of proving that if proceedings before the Immigration Judge were reopened, the new evidence would likely change the result in the case). Furthermore, this motion is untimely. When the applicant withdrew her appeal on November 12, 1996, the Immigration Judge's February 20, 1996, decision became the final administrative decision. 8 C.F.R. § 1003.39; *see also Matter of Oparah*, 23 I&N Dec 1 (BIA 2000); *Matter of Shih*, 20 I&N Dec. 697, 699 (BIA 1993). Because a final administrative decision was entered, the clock for filing a motion to remand began to run and the applicant had only 90 days to file her motion. 8 C.F.R. § 1003.2(c)(2); *see also Matter of Oparah, supra* (finding that a motion to remand in substance remains a motion to reopen and is governed by a procedural regulations

relevant to motions to reopen); *Matter of Coelho, supra* (holding that motions to remand are subject to the same substantive requirements as motions to reopen). The applicant filed her motion to remand several years after the Immigration Judge's final administrative decision. Therefore, the applicant's motion to remand for special rule cancellation is untimely.

Accordingly, the following orders shall be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motions to remand are denied.

/s/ Patricia A. Cole
FOR THE BOARD

THE UNITED STATES
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS

FILE NO: A73-113-706	)	
IN THE MATTER OF:	)	**IN EXCLUSION PROCEEDINGS**
Vera Samodumova,	)	
APPLICANT	)	

CHARGES: Section 212(a)(6)(C)(i) – Entry into the United States by fraud or willfully misrepresenting a material fact;

Section 212(a)(7)(A)(i)(I) – Non-possession of a valid document of identity and nationality.

APPLICATION: Motion to Remand Adjustment Applications to Houston District Director (treated as a Motion to Reopen)

ON BEHALF OF APPLICANT:

Harold Seligman, Esq.
1200 Post Oak Blvd.
Suite 314
Houston, TX

ON BEHALF OF SERVICE:

Benjamin D. Somera, Esq.
Assistant District Counsel
Houston, TX

DECISION AND ORDER OF THE IMMIGRATION JUDGE

-Procedural History-

Applicant is a forty-two year-old female native and citizen of Russia. She entered the United States at or

near Houston, Texas on or about September 28, 1994 by presenting a fraudulent visa and passport to inspection officers. Applicant was detained by Immigration and Naturalization Service (Service) officers at that time. By Notice to Applicant for Admission Detained For Hearing Before Immigration Judge (Form I-122) issued on September 28, 1994, the Service charged Respondent as excludable pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (Act), for seeking to procure entry into the United States by fraud or willfully misrepresenting a material fact, and section 212(a)(7)(A)(i)(I) of the Act, for failing to be in possession of a valid document of identity and nationality as required under section 211(a) of the Act.

At an individual hearing held on October 7, 1994, Applicant, through counsel, conceded service of the Form I-122, admitted the allegations of fact, and conceded excludability. The Court found Applicant excludable as alleged by evidence that was reasonable, substantial and probative. *See Matter of Rico*, 16 I&N Dec. 181, 185 (BIA 1977). As relief from exclusion, Applicant made a request for asylum. Applicant was given a deadline of October 17, 1994 to file any and all applications for relief. The asylum application and all supporting documents were filed by the deadline.

At a merits hearing held on February 20, 1996, Applicant presented evidence to support her political asylum application. In an oral decision, the Court denied Applicant's request for asylum and ordered her deportation to Russia. *See* File. During the merits hearing, Applicant reserved her right to an appeal.

Applicant, through her counsel, thereafter filed a "Notice to Appeal to Board of Immigration Appeals of

Decision of Immigration Judge" (Form EOIR-26) on February 29, 1996, to which the Service timely filed a brief in opposition. *See* File. However, while the appeal was still pending before the Board of Immigration Appeals (Board), Applicant, through her attorney, filed a Motion to Reopen on September 28, 1996. This Motion to Reopen was forwarded to the Board and received by them on September 30, 1996. On December 10, 1996, Applicant withdrew her appeal, and later the Record of Proceedings (Record) was returned to the Immigration Court. *See* File. A few months later on May 15, 1997, Applicant filed a "Request for Decision."[1] *See* File. Thereafter, Applicant received a deportation letter (Form I-166) from the Service which indicated Applicant's departure date as June 25, 1997. Applicant filed a "Motion to Stay Deportation" on June 23, 1997 with the Immigration Court.

A hearing was held on June 24, 1997 wherein the Court issued its decision on the Applicant's "Request for Decision of Respondent's Motion to Reopen" and her "Motion for Stay of Deportation." Upon review of the procedural history and evidence, the Court denied both the "Request for Decision" and the "Motion for Stay of Deportation." The Court found that by withdrawing her appeal from the Board, Applicant had effectively withdrawn her Motion to Reopen such that there was nothing pending before the Board and nothing pending before the Immigration Court when the Record of Applicant's case was

[1] Respondent wanted to get a decision on her Motion to Reopen which had earlier been forwarded to the Board, since the case still had the appeal pending when the Motion to Reopen originally arrived. By the time of Applicant's "Request for Decision," all records of proceedings had been returned, including the Motion to Reopen, to the Immigration Court.

returned to the Court. The Court therefore concluded that there was no motion to reopen pending in Applicant's case. Additionally, the Court noted that even if a motion to reopen had been properly filed before the court, Applicant's Motion to Reopen would have been denied because Applicant was ineligible for adjustment of status.

Applicant, through her attorney, subsequently filed a second appeal received by the Board on July 21, 1997. This appeal sought to have the June 24, 1997 decision on the "Request for Decision" and "Motion for Stay of Deportation" reversed. While this appeal was still pending, Applicant received from the Service a "Notice of Deferred Action" dated September 19, 1997. Thereafter, on November 4, 1997, Applicant, through her attorney, filed a "Motion to Withdraw Appeal" with the Board. *See* File. The Board once again returned the Record to the Court. On February 25, 1998, Applicant filed the currently pending "Motion to Remand Adjustment Applications to the Houston District Director" to which the Service timely filed a brief in opposition. *See* File.

Applicant now seeks to have this Court remand her case to Houston's District Director for a final decision on her adjustment of status application. She asserts that she has an approved Petition for Amerasian, Widow or Special Immigrant (Form I-360) and that the Service has granted her deferred action status until December 19, 1998 in order to apply for adjustment of status. In support of her motion, Applicant submitted a copy of the approval notice for her Form I-360 petition based on her status as a spouse of an abusive United States citizen. The approval notice also verifies Applicant's deferred action status until December 19, 1998. The Service contends that Applicant's

motion should be denied for failure to comply with the statutory requirements of a motion to reopen.

For the reasons that follow, Applicant's Motion to Reopen will be denied.

-Discussion-

Pursuant to regulation, an immigration judge's decision may be rendered orally or in writing. 8 C.F.R. § 3.37. Unless certified by the Board, the immigration judge's decision becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken, whichever date is first. 8 C.F.R. § 3.39. Appeal of an immigration judge's decision may be made to the Board. 8 C.F.R. § 3.38(a). Such an appeal may be made by filing a Form EOIR-26 within thirty calendar days after an oral or written decision has been issued in the case. *Id.* The Notice of Appeal's filing date shall be considered the date the Form EOIR-26 is received by the Board. 8 C.F.R. § 3.38(c).

The Immigration Judge's decision to deny Applicant's request for asylum and to order her deported was rendered orally at a merits hearing held on February 20, 1996. At that time, the Applicant, through counsel, reserved her right to appeal. Applicant sought an appeal of the Immigration Judge's decision and timely filed a Form EOIR-26 with the Board on February 29, 1996. While the appeal was pending before the Board, Applicant filed a Motion to Reopen on September 28, 1996. As the Board had jurisdiction over Applicant's case, the Motion to Reopen was forwarded to the Board for consideration. *See* 8 C.F.R. § 3.23(b).

In appellate cases, the party taking the appeal may file a written withdrawal to the office with whom the Notice of Appeal was filed. 8 C.F.R. § 3.4. If the record has not been forwarded to the Board, then the decision rendered in the case shall be a final decision to the same extent as if no appeal had been taken. 8 C.F.R. § 3.4. Where the record has been forwarded to the Board, then the appeal withdrawal request must be forwarded to the Board. *Id.* The record will be returned to the immigration court and the immigration judge's initial decision will be final, as if no appeal had ever been taken, only if no appellate decision has been rendered by the time the written withdrawal request is received by the Board. 8 C.F.R. § 3.4.

Applicant filed a written "Motion to Withdraw Appeal" with the Board on December 10, 1996, as permitted by the regulations. *See* 8 C.F.R. § 3.4. At the time of the Board's receipt of the written withdrawal request, no appellate decision had been rendered. The Board notified Applicant and the Service of its receipt of the withdrawal request on December 10, 1996 and found "nothing now pending before the Board." *See* File. The withdrawal effected a withdrawal of the appeal as well as the Motion to Reopen filed on September 28, 1996. The initial finding of excludability and order of deportation issued on February 20, 1996 by the Immigration Judge therefore became final to the same extent as if no appeal had been taken. *See* 8 C.F.R. § 3.4; *see also Matter of Keyte*, 20 I&N Dec. 158 (BIA 1990).

In accordance with the Board's finding, the Immigration Court denied Applicant's subsequent "Request for a Decision on the Motion to Reopen" and "Motion for Stay of Deportation" on June 24, 1997. Although Applicant sought

an appeal of this decision, she withdrew this appeal as well after the Service granted her deferred action status.

On February 25, 1998, Applicant filed another motion, this time, a "Motion to Remand." Inasmuch as Applicant labeled her motion a "Motion to Remand Adjustment Applications to the Houston District Director," she was seeking to have the case reopened in order to have the adjustment application decided upon to prevent Applicant's exclusion and deportation. Thus, Applicant's Motion to Remand will be treated as a motion to reopen.

Pursuant to regulations governing motions to reopen, a party is limited to only one motion to reopen proceedings, and that motion must be filed not later than ninety days after the date on which the final administrative decision was rendered in the proceedings sought to be reopened, or on or before September 30, 1996, whichever is later. 8 C.F.R. § 3.23(b). A motion to reopen an exclusion proceeding filed by an applicant does not have to conform to the above time and numerical limitations where it falls within an exception under 8 C.F.R. section 3.23(b)(4). *See* 8 C.F.R. §§ 3.23(b)(4)(i), (b)(4)(iii), and (b)(4)(iv).

In the case at bar, Applicant was ordered deported on February 20, 1996. Such order became final upon expiration of the time to appeal on March 20, 1996. *See* 8 C.F.R. § 3.39. Applicant filed her Motion to Reopen on November 4, 1997, over nineteen months after the Immigration Judge's decision became administratively final, and over a year after the September 30, 1996 filing deadline. Thus, Applicant's motion was untimely filed. Since Applicant's motion fails to meet any of the exceptions to the temporal limitations, Applicant's Motion to Reopen will be denied for its untimeliness.

Even if Applicant had filed her Motion to Reopen on a timely basis, she would have also had to demonstrate that the evidence she sought to offer was material, previously unavailable, and could not have been discovered or presented at the original hearing. *INS v. Doherty*, 502 U.S. 314, 322-23 (1992); *INS v. Abudu*, 485 U.S. 94, 104 (1988); *INS v. Jong Ha Wang*, 450 U.S. 139, 141 (1981) (per curiam); *Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992); 8 C.F.R. § 3.23(b)(3). The motion to reopen also had to state the new facts to be proven at reopening, supported by affidavits or other evidentiary material. 8 C.F.R. § 3.23(b)(3).

Applicant has not demonstrated that the evidence she wishes to offer is material and previously unavailable for presentation at the original hearing. At the original hearing, Applicant filed a political asylum application as the only form of relief she sought. In support of her asylum claim, Applicant presented testimonial and documentary evidence in which she alleged abuse from her United States citizen ex-husband. The Record shows that Applicant separated from her United States citizen ex-husband on or near June 17, 1995, yet she did not file an adjustment of status application under the battered spouse provisions between the separation date and her subsequent hearing date of February 20, 1996, nor did she ask the Court for a continuance to do so. Instead, Applicant chose to move forward with her hearing based solely upon the political asylum claim. The Record therefore reflects that Applicant's allegations of abuse by her former spouse constitute information previously available at the prior hearing and do not amount to new facts.

Additionally, any motion to reopen for the purpose of acting on an application for relief must be accompanied by

the appropriate application for relief and all supporting documents. 8 C.F.R. § 3.23(b)(3). Here, Applicant seeks relief through an adjustment of her status. Her Motion to Reopen refers to the adjustment of status application attached to a motion to reopen previously submitted on September 28, 1996 and subsequently withdrawn upon withdrawal of appeal. However, she has not submitted her application for adjustment of status along with the currently pending Motion to Reopen. Applicant's lack of statutory compliance serves as an additional ground for denying her Motion to Reopen.

The Court also notes that it has no jurisdiction to consider an adjustment application filed by an applicant in exclusion proceedings. *See* 8 C.F.R. § 242. In fact, Applicant, in her brief, acknowledges that jurisdiction of her adjustment of status application generally lies with the District Director of the Service. However, she argues that the Immigration Judge could reopen and then remand the proceedings of this case to the District Director so that her adjustment application may be adjudicated. *See* Applicant's "Motion to Remand."

A *sua sponte* remand of a proceeding by an immigration judge will encroach upon a District Director's exclusive jurisdiction to control the prosecution of those aliens who are deportable. *Matter of Roussis*, 18 I&N Dec. 256 (BIA 1982). Where the Service decides to initiate proceedings against an alien and to prosecute those proceedings to a final conclusion, then it is the immigration judge's duty to see to the prompt completion of the proceedings. *Id.*; *see also* 8 C.F.R. § 242.7(e). The regulations clearly do not vest prosecutorial discretion with the immigration judge or the alien; this authority belongs only to the District Director.

While the regulations do authorize the District Director, in certain specified instances, to request the dismissal of a case after exclusion proceedings have begun, such is not the case at hand. The District Director did not terminate or remand the proceedings. The Record shows that the Immigration Judge properly evaluated the evidence Applicant presented and found Applicant excludable on the grounds charged. Applicant's Motion to Remand therefore must also be denied because Applicant is statutorily barred from exercising prosecutorial authority.

-Conclusion-

For the foregoing reasons, Applicant's "Motion to Remand Adjustment Applications to the Houston District Director," treated here as a motion to reopen, will be denied.

> Accordingly, IT IS HEREBY ORDERED that Applicant's "Motion to Remand Adjustment Applications to Houston District Director" is DENIED.

7/8/98
Date

/s/ Clarease Mitchell Rankin
Clarease Mitchell Rankin
Immigration Judge

THE UNITED STATES
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS

FILES: A73-113-707 A73-113-708	)	
IN THE MATTER OF:	)	
Andrey A. Samodumova and Nikita A. Samodumova, **RESPONDENTS.**	)	**IN DEPORTATION PROCEEDINGS**

CHARGES: Section 241(a)(1)(B) of the Immigration and Nationality Act – for being in violation of the Act or any other law of the United States.

Section 241(a)(1)(A) of the Immigration and Nationality Act – excludable at time of entry.

APPLICATION: Motion to Remand Adjustment Applications to Houston District Director (treated as a Motion to Reopen)

ON BEHALF OF RESPONDENT:

Harold Seligman, Esq.
1200 Post Oak Blvd.,
Suite 314
Houston, TX 77056

ON BEHALF OF SERVICE:

Benjamin D. Somera, Esq.
Assistant District Counsel
Houston, TX

DECISION AND ORDER OF THE IMMIGRATION JUDGE

-Procedural History-

Respondents are fourteen and sixteen year-old brothers who are natives and citizens of Russia. Both entered the United States at or near Houston, Texas on or about September 28, 1994 by fraud and willful misrepresentation of a material fact without being admitted or paroled after inspection by an Immigration Officer. Respondents managed to enter the United States although the Immigration and Naturalization Service (Service) detained their mother. By separate Orders to Show Cause (OSCs) issued on March 17, 1995, the Service charged Respondents with deportability pursuant to sections 241(a)(1)(A) and 241(a)(1)(B) of the Immigration and Nationality Act (Act).

At an individual hearing held on October 7, 1994, Respondents, through counsel, conceded service of the OSCs, admitted to the allegations of fact found in the OSCs, and conceded deportability. The Court found Respondents deportable as charged by clear, unequivocable and convincing evidence. 8 C.F.R. 242.14(a); *Woodby v. INS*, 385 U.S. 276, 286 (1966). The Court also granted Respondents' requests to consolidated their cases for hearing on the issue of relief from deportation. *See* File A73-113-706. During a consolidated hearing, Respondents made their relief from deportation contingent upon their mother's application for asylum relief. In the alternative, Respondents requested voluntary departure. Respondents and their mother were given a deadline of October 17, 1994 to file any and all applications for relief. The asylum application and all supporting documents were filed by the deadline.

At a merits hearing held on February 20, 1996, Respondents' mother presented evidence to support her political asylum application. In an oral decision, their mother's request for asylum was denied. *See* Files. However, Respondents were granted a period of voluntary departure until March 30, 1996 with an alternative order of deportation. *See* Files. During the merits hearing, Respondents reserved their rights of appeal.

Respondents, through their counsel, filed a "Notice to Appeal to Board of Immigration Appeals of Decision of Immigration Judge" (Form EOIR-26) on February 29, 1996, to which the Service timely filed a brief in opposition. *See* Files. However, while the appeal was still pending before the Board of Immigration Appeals (Board), Respondents, through their attorney, filed a Motion to Reopen on September 28, 1996. This Motion to Reopen was forwarded to the Board and received by them on September 30, 1996. On December 10, 1996, Respondents withdrew their appeal and the Records of Proceedings (Records) were later returned to the Immigration Court. *See* Files. A few months later on May 15, 1997, Respondents filed a "Request for Decision."[1] *See* Files. Thereafter, Respondents received a deportation letter (Form I-166) from the Service which designated Respondents' final departure date as June 25, 1997. Respondents filed a "Motion for Stay of Deportation" on June 23, 1997 with the Immigration Court.

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[1] Respondents wanted to get a decision on their Motion to Reopen which had earlier been forwarded to the Board, since the case still had the appeal pending when the Motion to Reopen originally arrived. By the time Respondents filed their "Request for Decision," all records of proceedings had been returned, including the Motion to Reopen, to the Immigration Court.

A hearing was held on June 24, 1997 wherein the Court issued its decision on the Respondents' "Request for Decision on Respondent's Motion to Reopen" and their "Motion for Stay of Deportation." Upon review of the procedural history and evidence, the Court denied both the "Request for Decision" and the "Motion for Stay of Deportation." The Court found that by withdrawing their appeal from the Board, Respondents had effectively withdrawn their Motion to Reopen such that there was nothing pending before the Board and nothing pending before the Immigration Court when the Records of Respondents' cases were returned to the Court. The Court therefore concluded that there was no motion to reopen pending in Respondents' cases. Additionally, the Court noted that even if a motion to reopen had been properly filed before the Court, Respondents' Motion to Reopen would have been denied because Respondents' mother was ineligible for adjustment of status.

Respondents, through their attorney, subsequently filed a second appeal received by the Board on July 21, 1997. This appeal sought to have the June 24, 1997 decision on the "Request for Decision" and "Motion for Stay of Deportation" reversed. While this appeal was still pending, Respondents' mother received from the Service a "Notice of Deferred Action" dated September 19, 1997. Thereafter, on November 4, 1997, Respondents, through their attorney, filed a "Motion to Withdraw Appeal" with the Board. *See* Files. The Board once again returned the Records to the Court. On February 25, 1998, Respondents filed the currently pending "Motion to Remand Adjustment Applications to the Houston District Director," to which the Service timely filed a brief in opposition. See Files.

Respondents now seek to have this Court remand their case to Houston's District Director for a final decision on their mother's adjustment of status application. In support of their motion, Respondents submitted a copy of the approval notice for their mother's Form I-360 petition based on her status as the spouse of an abusive United States citizen. The approval notice additionally indicates that the Service had granted Respondents' mother deferred action status until December 19, 1998. The Service contends that because Respondents have failed to comply with the requirements of a motion to reopen and have failed to comply with the terms of their voluntary departure, their motion to remand, treated here as a motion to reopen, should be denied.

For the reasons that follow, Respondents' motion to reopen will be denied.

-Discussion-

Pursuant to regulation, an immigration judge's decision may be rendered orally or in writing. 8 C.F.R. § 3.37. Unless certified by the Board, the Immigration Judge's decision becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken, whichever date is first. 8 C.F.R. § 3.39. Appeal of an immigration judge's decision may be made to the Board. 8 C.F.R. § 3.38(a). Such an appeal may be made by filing a Form EOIR-26 within thirty calendar days after the oral or written decision has been issued in the case. *Id.* The Notice of Appeal's filing date shall be considered the date the Notice is received by the Board. 8 C.F.R. § 3.38(c).

The Immigration Judge's decision to deny Respondents' contingent requests for asylum, to grant them

voluntary departure, and to order them deported in the alternative was rendered orally at a merits hearing held on February 20, 1996. At that time, Respondents, through counsel, reserved their rights to appeal. Respondents sought an appeal of the Immigration Judge's decision and timely filed a Form EOIR-26 with the Board on February 29, 1996. While the appeal was pending before the Board, Respondents filed a Motion to Reopen on September 28, 1996. As the Board had jurisdiction over Respondents' cases, the Motion to Reopen was forwarded to the Board for consideration. *See* 8 C.F.R. §3.23(b).

In appellate cases, the party taking the appeal may file a written withdrawal to the office with whom the Notice of Appeal was filed, 8 C.F.R. § 3.4. If the record has not been forwarded to the Board, then the decision rendered in the case shall be a final decision to the same extent as if no appeal had been taken. 8 C.F.R. § 3.4. Where the record has been forwarded to the Board, then the appeal withdrawal request must be forwarded to the Board. *Id.* The record will be returned to the immigration court and the immigration judge's initial decision will be final, as if no appeal had ever been taken, only if no appellate decision has been rendered by the time the written withdrawal request is received by the Board. 8 C.F.R. § 3.4.

Respondents filed a written "Motion to Withdraw Appeal" with the Board on December 10, 1996, as permitted by the regulations. *See* 8 C.F.R. § 3.4. At the time of the Board's receipt of the written withdrawal request, no appellate decision had been rendered. The Board notified Respondents and the Service of its receipt of the withdrawal request on December 10, 1996 and found "nothing now pending before the Board." *See* Files. The withdrawal

effected a withdrawal of the appeal as well as the Motion to Reopen filed on September 28, 1996. The initial finding of deportability and grant of voluntary departure, with an alternative order of deportation, issued on February 20, 1996 by the Immigration Court therefore became final to the same extent as if no appeal had been taken. *See* 8 C.F.R. § 3.4; *see also Matter of Keyte,* 20 I&N Dec. 158 (BIA 1990).

In accordance with the Board's finding, the Immigration Court denied Respondents' subsequent "Request for Decision on the Motion to Reopen" and the "Motion for Stay of Deportation" on June 24, 1997. Although Respondents sought an appeal of this decision, they withdrew this appeal as well.

On February 25, 1998, Respondents filed another motion, this time, a "Motion to Remand." Inasmuch as Respondents labeled their motion a "Motion to Remand Adjustment Applications to the Houston District Director," they were seeking to have the case reopened in order to have their mother's adjustment application adjudicated to prevent their deportation. Thus, Respondents' Motion to Remand will be treated as a motion to reopen.

Pursuant to regulations governing motions to reopen, a party is limited to only one motion to reopen proceedings, and that motion must be filed not later than ninety days after the date on which the final administrative decision was rendered in the proceedings sought to be reopened, or on or before September 30, 1996, whichever is later. 8 C.F.R. § 3.23(b). A motion to reopen an [sic] deportation proceeding filed by a respondent does not have to conform to the above time and numerical limitations where it falls within an exception under 8 C.F.R. section

3.23(b)(4). *See* 8 C.F.R. §§ 3.23(b)(4)(i), (b)(4)(iii), and (b)(4)(iv).

In the case at bar, Respondents were given voluntary departure on February 20, 1996, with an alternative order of deportation if they did not depart the United States by March 20, 1996. Such orders became final as of the date the Court issued its decision once Respondents withdrew their appeal. *See* 8 C.F.R. § 3.39, Respondents filed their Motion to Reopen on November 4, 1997, over nineteen months after [sic] Immigration Judge [sic] decision became administratively final, and over a year after the September 30, 1996 filing deadline. Thus, Respondents' motion was untimely filed. Since Respondents' Motion to Reopen fails to meet any of the exceptions to the temporal limitations, Respondents' Motion to Reopen must be denied for its untimeliness.

Even if Respondents had filed their Motion to Reopen on a timely basis, they would have also had to demonstrate that the evidence they sought to be offered is material, previously unavailable, and could not have been discovered or presented at the original hearing. *INS v. Doherty,* 502 U.S. 314, 322-23 (1992); *INS v. Abudu,* 485 U.S. 94, 104 (1988); *INS v. Jong Ha Wang,* 450 U.S. 139, 141 (1981) (per curiam); *Matter of Coelho.* 20 I&N Dec. 464, 472 (BIA 1992); 8 C.F.R. § 3.23(b). A motion to reopen must also state the new facts to be proved at reopening, supported by affidavits or other evidentiary material. 8 C.F.R. § 3.23(b)(3).

Respondents have not demonstrated that the new evidence they wish to offer is material and previously unavailable for presentation at the original hearing. At the original hearing, Respondents' deportation outcome was

contingent upon their mother's political asylum application, which was the only form of relief she sought for herself and for them. In support of the asylum claim, Respondents' mother presented testimonial and documentary evidence in which she alleged abused [sic] from her United States citizen ex-husband. The Records show that Respondents' mother separated from her United States citizen husband on or hear June 17, 1995, yet she did not file an adjustment of status application between the separation date and her subsequent hearing date of February 20, 1996, nor did she or the Respondents ask the Court for a continuance to do so. Instead, they chose to move forward with the hearing based solely upon the asylum claim. The Records therefore reflect that Respondents' allegations of their mother's abuse by her former spouse constitute information previously available at the prior hearing and do not amount to new facts.

Additionally, any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. 8 C.F.R. § 3.23(b)(3). Here, Respondents seek relief through their mother's adjustment of status application. The Motion to Reopen refers to the adjustment of status application attached to a motion to reopen previously submitted on September 28, 1996 and subsequently withdrawn upon withdrawal of appeal. However, Respondents have not submitted their mother's application for adjustment of status along with the currently pending Motion to Reopen. Respondents' lack of statutory compliance serves as an additional ground for denying their Motion to Reopen.

The Court also notes that it has no jurisdiction to consider an adjustment application filed by an applicant in

exclusion proceedings. *See* 8 C.F.R. §242. In fact, Respondents, in their brief, acknowledge that jurisdiction of their mother's adjustment of status application generally lies with the District Director of the Service. However, Respondents argue that the Immigration Judge could reopen and then remand the proceedings of their cases to the District Director so that their mother's adjustment application may be adjudicated. *See* Respondents' "Motion to Remand."

A *sua sponte* remand of a proceeding by an immigration judge will encroach upon a District Director's exclusive jurisdiction to control the prosecution of those aliens who are deportable. *Matter of Roussis,* 18 I&N Dec. 256 (BIA 1982). Where the Service decides to initiate proceedings against an alien and to prosecute those proceedings to a final conclusion, then it is the immigration judge's duty to see to the prompt completion of the proceedings. *Id.*; *see also* 8 C.F.R. § 242.7(e). The regulations clearly do not vest prosecutorial discretion with the immigration judge or the alien; this authority belongs only to the District Director.

While the regulations do authorize that the District Director, in certain specified instances, can request the dismissal of a case after deportation proceedings have begun, such is not the case at hand. The District Director did not terminate or remand the proceedings. The Records show that the Immigration Judge properly evaluated the evidence Respondents and their mother presented and found Respondents deportable on the grounds charged. Respondents' Motion to Remand therefore must also be denied because Respondents are statutorily barred from exercising prosecutorial authority.

Respondents have the additional task of showing that their Motion to Reopen should not be denied for purely discretionary reasons. An alien who has failed to depart under a grant of voluntary departure or who has failed to appear as required for deportation has a very heavy burden to meet in order to show that he is discretionarily deserving of reopening. This burden is imposed on the respondent because the purpose of voluntary departure is not to allow an alien who is otherwise deportable to remain in the United States indefinitely until he is eligible for some other form of relief from deportation. *See generally, Matter of Shaar,* Int. Dec. 3290 at 8 (BIA 1996). Pursuant to section 244 of the Act, an alien who fails to depart following a grant of voluntary departure is statutorily barred from applying for certain forms of discretionary relief. *See* § 244 of the Act.

At the hearing held on February 20, 1996, Respondents, through counsel, agreed to voluntarily depart the United States by March 20, 1996 and established to the satisfaction of the Court that they were willing and able to do so. Despite notice of the consequences of their failure to depart, Respondents did not depart by the March 20, 1996 deadline. When Respondents failed to depart, as agreed, the alternative order of deportation to Holland, or to Russia, if Holland did not accept Respondents into its country, became immediately effective. The Service scheduled their deportation for June 25, 1997, but Respondents failed to present themselves for deportation. Respondents' conduct establish [sic] that their deportation proceedings do not warrant reopening in the exercise of discretion.

-Conclusion-

For the foregoing reasons, Respondents' "Motion to Remand Adjustment Applications to Houston District Director," treated here as a motion to reopen, will be denied.

According, IT IS HEREBY ORDERED that Respondents' "Motion to Remand Adjustment applications to the Houston District Director" is DENIED.

7/8/98
Date

/s/ Clarease Mitchell Rankin
Clarease Mitchell Rankin
Immigration Judge

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Action

THE UNITED STATES OF AMERICA

RECEIPT NUMBER EAC-97-186-50311		I-360 PETITION FOR AMERASIAN WIDOWER, OR SPECIAL IMMIGRANT
RECEIPT DATE July 1, 1997	PRIORITY DATE October 18, 1994	PETITIONER SAMODUMOVA, VERA D.
NOTICE DATE August 18, 1997	PAGE 1 of 1	BENEFICIARY A73 113 706 SAMODUMOVA, VERA D.
HAROLD SELIGMAN 1200 POST OAK BLVD STE 314 HOUSTON TX 77056	**Notice Type:** Approval Notice Section: Self-Petitioning Spouse of Abusive U.S.C. or LPR	

The above petition has been approved.

The petition indicates that the person the petition is for is in the United States and will apply for adjustment of status. He or she should contact the local INS office to obtain Form I-485, Application for Permanent Residence. A copy of this notice should be submitted with the application.

If the person for whom you are petitioning decides to apply for a visa outside the United States based on this petition, the petitioner should file Form I-824, Application for Action on an Approved Application or Petition, with this office to request that we send the petition to the Department of State National Visa Center (NVC).

The NVC processes all approved immigrant visa petitions that require consular action. The NVC also determines which consular post is the appropriate consulate to complete visa processing. It will then forward the approved petition to that consulate.

Please read the back of this form carefully for more information.

THIS FORM IS NOT A VISA NOR MAY IT BE USED IN PLACE OF A VISA.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

IMMIGRATION & NATURALIZATION SERVICE
VERMONT SERVICE CENTER
75 LOWER WELDEN STREET
SAINT ALBANS VT 05479-0001
Customer Service Telephone: (802) 527-3160